

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION - CINCINNATI**

FRANK J. THACKER,	:	Case No. 1:21-cv-704
	:	
Petitioner,	:	Judge Matthew W. McFarland
	:	
v.	:	
	:	
WARDEN, Noble Correctional	:	
Institution,	:	
	:	
Respondent.	:	

**ENTRY AND ORDER ADOPTING SUPPLEMENTAL REPORT AND
RECOMMENDATION (Doc. 26)**

The Court has reviewed the Supplemental Report and Recommendation (“Report”) of United States Magistrate Judge Michael R. Merz (Doc. 26), to whom this case is referred pursuant to 28 U.S.C. § 636(b). In the Report, Magistrate Judge Merz recommended that the Court dismiss Petitioner’s Petition for Writ of Habeas Corpus (Doc. 1) with prejudice. Petitioner timely filed Objections to the Report (Doc. 30). Thus, this matter is ripe for the Court’s review.

Petitioner solely objects to Magistrate Judge Merz’s recommendation that Grounds One through Five of Petitioner’s six grounds for relief listed in his Petition for Writ of Habeas corpus should be dismissed because such grounds are procedurally defaulted. Petitioner claims that Grounds One through Five are not procedurally default due to ineffective assistance of his appellate counsel. Petitioner argues that his counsel’s failure to present Grounds One through Five on direct appeal to the Ohio

Supreme Court constituted ineffective assistant of counsel, thereby excusing the procedural default of such grounds. However, as Magistrate Judge Merz correctly stated, “[i]n effective assistance of counsel can excuse procedural default only when it occurs in a proceeding where a defendant is constitutionally entitled to counsel under the Sixth Amendment. *Wainwright v. Torna*, 455 U.S. 586 (1982) . . .” And the Supreme Court has held that there is no right to counsel on discretionary appeals, such as an appeal to the Ohio Supreme Court. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Therefore, as required by 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), the Court has made a de novo review of the record in this case. Upon said review, the Court finds that Petitioner’s Objections (Doc. 30) are not well-taken and is thus **OVERRULED**. For the foregoing reasons, the Court **ADOPTS** the Report and Recommendation (Doc. 26) in its entirety and **ORDERS** the following:

- (1) Petitioner’s Petition for Writ of Habeas Corpus (Doc. 1) is **DISMISSED WITH PREJUDICE**;
- (2) Because reasonable jurists would not disagree with this conclusion, Petitioner is **DENIED** a certificate of appealability;
- (3) The Court **CERTIFIES** that any appeal of this Order would be objectively frivolous and, therefore, Petitioner should not be permitted to proceed *in forma pauperis*; and
- (4) This matter is **TERMINATED** from the Court’s docket.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

By: 
JUDGE MATTHEW W. McFARLAND